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IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

No. 931

JAMES S. RAIDY

Petitioner,

vs.

UNITED STATES OF AMERICA

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BERNARD M. GOLDSTEIN,
1716 Court Square Building
Baltimore 2, Maryland

MARVIN I. SINGER,

Counsel for Petitioner.

King Bros., Inc., Printers, 208 N. Calvert St., Baltimore, Md. (4-9-58—50)

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UNITED STATES OF AMERICA

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

JAMES S. RAIDY, your Petitioner, prays that a writ of certiorari issue to review the decree of the United States Court of Appeals for the Fourth Circuit, entered in the above-entitled case on February 11, 1958.

CITATIONS TO OPINIONS BELOW

The opinion of the District Court, printed in Record 1a, p. 61, is reported in 153 F. Supp. 777. The opinion of the Circuit Court of Appeals, printed in Appendix A hereof, p. 16, is unreported as yet.

JURISDICTION

The decree of the Circuit Court of Appeals was entered on February 11, 1958; Appendix A, p. 16, infra.

The jurisdiction of this Court is invoked under Title 28, United States Code Annotated, Section 1254 (1).

QUESTIONS PRESENTED

I. Is the seaworthy cause of action available to a shipfitter working on a vessel in a floating drydock who was injured at night under poor lighting conditions by falling through an unguarded hole in the operating walkway of the vessel?

II. Is a negligence cause of action made out where the uncontradicted facts established that a shipfitter working on a vessel in floating drydock was injured at night under poor lighting conditions by falling through an unguarded hole in the walkway after the shipowner's representatives knew the working conditions were unsafe but gave no warning and took no precautionary measures?

STATEMENT

The libel was brought under the Suits in Admiralty Acts (U.S.C.A. Tit. 46 sec. 741 *et seq*) against the United States as owner of the dredge, *S.S. Goethals* and claimed recovery for unseaworthiness, and in negligence, for failure to furnish a safe place to work. The Government impleaded Bethlehem and the case was tried by the District Judge without a jury.

The Petitioner, a ship fitter employed by Bethlehem sustained crippling injuries on the evening of October 27, 1954, when he fell some 30 feet through an unguarded hole in one of the operating walkways of the vessel.

It was *uncontradicted* that at the time of the accident he was working on one of the operating walkways of the vessel; that there was a hole in the walkway due to a miss-

ing plate; that the accident occurred at night and the lighting was poor. The District Court denied recovery as to each count, holding that the seaworthy warranty was not available and that the Government was not negligent. On appeal the Court of Appeals affirmed the Judgment of the District Court in a *per curiam* opinion.

Before the accident the *Goethals* was actively engaged in her duties as a navigable and seaworthy vessel. She came to the Bethlehem shipyard in Baltimore for the usual 12-18 month overhaul and the conversion of her unloading system; certain repairs and renovations were also to be made. Under the contract for the work, Bethlehem agreed to provide a safe place to work for its employees and to indemnify the Government against any liability for injuries resulting from the fault, negligence, wrongful acts or omissions of Bethlehem. The vessel was placed in a floating drydock for 13 days, although the over-all work lasted for a longer period. While in the dock some of the crew, including the chief electrician, maintained their quarters aboard the vessel and the Government had several inspectors aboard. (R. 1a, p. 19, 52; 2a, p. 3) After the work was completed the vessel resumed her service in navigation.

The accident occurred after night had fallen. The Government inspectors knew that work would be done at night requiring the use of the walkway and that sufficient lighting would be necessary. (R. 1a, p. 19, 51) However, although the customary lighting for the walkway had been removed before the accident, no substitute lighting was furnished and no warning of the hole was given. (R. 1a, p. 26, 46, 51-55) At the point where the Petitioner was working (the starboard side), there was no light at all. (R. 1a, p. 53, 55) The lighting there was described by the chief electrician as "very poor" and the District Court found this as a fact. (R. 1a, p. 52, 55, 64)

The Petitioner was working on one of the operating walkways of the vessel when he was hurt. The walkway consisted of removable steel plates 3x3 feet. One of the walkway plates located behind a work bench was missing, leaving a hole. There was a sheer drop of 30 feet from the hole to the bottom of the mixing well. The chief Government inspector had seen the hole earlier in the day but no precautions were taken and no warning was given. (R. 1a, p. 45)

The petitioner had been working below deck when he was instructed to go to the upper area to help lay a "chalk line,"—a guide line for the installation of a hopper. (R. 1a, p. 24, 25) He did not know there was a hole in the walkway. (R. 1a, p. 26) He complained about the lack of light but was told it was a "small job" which would only take a short time. (R. 1a, p. 25, 26) As he proceeded along the walkway with the line in the customary manner, he came into contact with the work bench and was feeling his way around it in the darkness when he plunged through the hole to the bottom of the mixing well. (R. 1a, p. 21, 26) *After* the accident a light was placed at the hole and the Government inspectors required a report of the accident. (R. 1a, p. 13-14)

The Petitioner suffered permanently crippling injuries including many fractures, internal injuries and disabling injuries to the spine, pelvis and brain. He has received a total of $895.00 in compensation payments. (R. 2a, p. 3) Under the terms of the Longshoremen and Harbor Workers' Act, he cannot claim any substantial additional benefits.

REASONS FOR GRANTING THE WRIT

I. CONFLICT AMONG DECISIONS OF CIRCUIT COURTS OF APPEALS—UNSEAWORTHINESS.

Conflict and uncertainty mark the decisions in the circuits as to the applicability of the seaworthy rule to shipyard workers. The District Court expressed the prevailing uncertainty at the close of the trial:

> ". . . Now, the question here is whether the *Sieracki* case is to be limited or to be extended. Now, is it not probably the situation, here, that . . . nobody will ever know until the Supreme Court decides it? . . . We do not have any *pro forma* orders in this Court. But it is the kind of case, after I have heard the respective arguments, in which, apparently, there is no flat decision of the Supreme Court, itself. Each side feels that its side of the case is consistent with the Supreme Court cases; but it looks to me as if the question were not definitely settled at the present time." (R. 1a, p. 61)

The 3rd Circuit Court of Appeals holds that unseaworthiness may be asserted by a repairman who was injured because of inadequate lighting while working on a vessel undergoing major conversion in the shipyard. *Read v. U. S.*, 201 F. 2d 758 (CA 3, 1953). The Court ruled that no distinction could be made between the repairman and the carpenter who was granted recovery in *Hawn v. Pope & Talbot, Inc.*, 3 Cir., 1952, 198 F. 2d 800, *affirmed*, 346 U. S. 406 (1953).

The 1st and 6th Circuits evince support for the 3rd Circuit's ruling. In *Christiansen v. U. S.*, 192 F. 2d 199 (1951) the 1st Circuit indicated that employees of a tank cleaning company were among the workers who could invoke unseaworthiness. The 6th Circuit in the case of a shipfitter who fell into an unguarded hole while the vessel was under repair during its winter lay-up, declared that recovery could have been based on unseaworthiness, al-

though the actual decision was grounded in negligence since the unseaworthiness claim had been withdrawn at the trial. *Pioneer Steamship Co. v. Hill,* 227 F. 2d 262 (CA 6, 1955). See also the language of the 6th Circuit in *Imperial Oil Ltd. v. Drlik,* 234 F. 2d 4 (1956) where a dock-worker was injured:

> ". . . The rule (unseaworthiness) has lately been extended to stevedores and others doing a seaman's work and incurring a seaman's hazards, although not in the employ of the owner of the vessel. [Citing *Sieracki, Hawn* and *Petterson* cases.] Appellee would fall within the protection of the rule so extended. . . ."

In the circuits that deny the applicability of the seaworthy warranty in like settings, there is disagreement as to the basis for the denial, thus foreshadowing ever-increasing conflicts. In the present case, the 4th Circuit denied a ship fitter working on a vessel undergoing major conversion in a shipyard the benefit of the unseaworthy rule, stressing the vessel's withdrawal from navigation and its surrender to the shipyard.

The conflict with the 3rd Circuit's decision in *Read* is plain although it was not openly stated. However, the 2nd Circuit in *Berge v. National Bulk Carriers Corp.* 251 F. 2d 717 (1958) conceded the conflict in denying the seaworthy warranty to a rigger working on a vessel in the shipyard who was injured when a shackle pin broke and the tackle fell upon him. The Court flatly said:

> ". . . We disagree with *Read v. United States,* 201 Fed. 2d 758 (CA 3)."

In *Berge,* the Court said that the test in determining whether the seaworthy doctrine would be applied was whether the workman was engaged in work of a kind that the crew of the vessel was accustomed to perform. But the nice line separating the cases became immediately apparent in *Halecki v. United N.Y. and N.J. Sandy Hook Pilots*

Ass'n, 251 F. 2d 708 (1958), a companion case, where a recovery was allowed a shoreside electrician engaged in cleaning the ship's generators by spraying them with a dangerous chemical. In *Halecki*, as in the instant case, the vessel was undergoing an annual overhaul and inspection at the repair yard and it was neccessary to use electric current from shore as the vessel was without her own. The Court acknowledged the unsatisfactory nature of its differentiation between *Berge* and *Halecki* by remarking:

> "As might be expected, so shadowy a line of demarcation will in application produce inconsistent results. . . ."

The decision in the present case increases the confusion by emphasizing the concept that a vessel undergoing major repairs is removed from navigation, hence the seaworthy warranty is unavailable. Under this view it is submitted that Halecki would not have gotten a recovery in the 4th Circuit. It also raises more problems than it solves because the crucial question becomes when are the repairs major enough to deprive the injured workman of the benefit of the seaworthy warranty? The maritime worker's right to invoke seaworthiness will come to be determined not by the work he is performing but by the nature of his employer's contract for repairs to the vessel. It is evident that serious injustice, many times on a hair-splitting basis, will certainly result.

The 9th Circuit Court of Appeals in *Berryhill v. Pacific Far East Line*, 238 F. 2d 385 (1956) emphasized that the unseaworthiness rule should be restricted to workmen engaged in loading and unloading operations, in refusing a machinist recovery for injuries caused by the explosion of a grinding wheel brought on board by his employer; thus again raising the question whether Halecki, the electrician, would have been awarded recovery in the 9th Circuit.

II. CONFLICT IN PRINCIPLE WITH DECISIONS OF THIS COURT—UNSEAWORTHINESS

The views of the Court below are inconsistent with, and it is believed, disregard the true meaning of this Court's opinions. In *Seas Shipping Co. v. Sieracki*, 328 U. S. 85, (1946), it was held that unseaworthiness gives rise to absolute liability, regardless of fault and that a longshoreman could claim the warranty against the shipowner. For some time *Sieracki* received a narrow interpretation in the lower courts, as illustrated by the 2nd Circuit's decision in *Guerrini v. U. S.*, 167 F. 2d 352 (1948) which refused to extend the rule to cover harbor workers other than stevedores.

This approach was again evidenced below, although the position had been made untenable as far back as 1953 with the decision in *Pope & Talbot, Inc. v. Hawn*, 346 U.S. 406, where the majority clearly gave *Sieracki* the broadest reading. Hawn was a carpenter whose employer was engaged to repair the grain feeders on a ship and was injured when he slipped on some loose grain. Although the Court was urged to reverse *Sieracki* or at least limit its application to longshoremen, it chose to "adhere to *Sieracki*" and extended the doctrine to cover *workers like Hawn*. The opinion emphasized that Hawn's need for protection from unseaworthiness was the same as that of the stevedores working with him; that *all were subjected to the same danger and all were entitled to like treatment under the law*. Since then the 2nd Circuit has acknowledged that it was wrong in *Guerrini*.

In this case the Courts below have completely ignored the underlying consideration in *Hawn* to grant the remedy to maritime workers exposed to the same dangers and have emphasized only the "traditional work of seamen" passage as the criterion for the application of the seaworthiness

rule. This has led to discriminations without solid basis as the 2nd Circuit recognized in *Halecki*. The attempt to categorize workers who perform essentially similar tasks, into those who may obtain the protection of the rule and those who cannot, is impractical and unworkable.

The repairman is as closely connected with maritime service as the longshoreman, the cleaner, the carpenter or the painter. He is equally exposed to the hazards of ship's work. Despite this, the unseaworthiness rule is denied him but granted to other workers. Indeed, the dissenting opinion in *Halecki* insisted forcefully that the work of the rigger who was refused recovery in *Berge* was as close to traditional seamen's activity (even more so the Judge thought) as the work of the electrician engaged in the specialized work of spraying the ship's generators with a chemical, who was granted a recovery in *Halecki*. Moreover, Halecki, unlike Berge or Petitioner, was employed principally ashore, not on ships.

It is respectfully submitted that discriminations of this sort are unfair and were not intended by this Court. Let us suppose that Raidy, the injured workman in the present case, instead of a ship fitter, was a carpenter or cleaner working on the vessel. In the supposed case, it seems the 2nd Circuit would apply the seaworthy rule because the work could be assimilated to the customary work of seamen; but the ship fitter would be denied its protection. *A fortiori*, in the 4th Circuit, even the carpenter or cleaner could not claim recovery because under its ruling unseaworthiness is not available where a vessel is undergoing major work.

Surrender of control.

In reaching the present decision, the Courts below relied heavily on the rejected "surrender of control" doctrine. In

Alaska S.S. Co. v. Petterson, 205 F. 2d 478 (CA 9, 1953), 347 U.S. 390 (1954), this Court upheld a recovery based on unseaworthiness due to faulty equipment brought on board by the injured stevedore's employer, although control of the vessel had been surrendered. See also *Rogers v. U.S. Lines,* 347 U.S. 984 (1954). After these decisions, the 2nd Circuit which had evolved the Control Doctrine openly repudiated it. See *Tarkington v. U.S. Lines Co.* 222 F. 2d 358 (1955).

Despite this, in the present case the District Court relied strongly upon surrender of control as did the Court of Appeals which, during the argument and in its opinion, stressed that the lighting for the work was controlled and was to be supplied by the shipyard:

> ". . . He complains of the hole in the catwalk and contends that the lighting was insufficient, *although the lighting for the repair job was furnished by the shipyard and not by the vessel. . . .*"

And again,

> " '. . . *The owner maintained no control over the work* by the independent contractor other than the right to inspect to determine whether the structural changes were being performed in accordance with the elaborate specifications. . . .' " (Emphasis supplied) *Raidy v. United States.* (Appendix A, p. 16.)

This represents an attempt to revive the discarded doctrine and re-introduce the fault concept as the basis for liability in unseaworthiness cases, contrary to this Court's decisions. It also raises doubts which, unless dispelled, will increase the confusion in the lower courts and serve to arrest the development of the law as intended by this Court.

Also, the theory that a vessel undergoing major repairs is removed from navigation and is therefore not subject to

the Admiralty rules, seems directly contrary to this Court's holding in *The Jefferson*, 215 U.S. 130 (1909), where it was said that a vessel in drydock for major repairs remains an object of the Admiralty law.

Court's interest in questions.

This Court evinced its intention to resolve the questions when it granted certiorari in *Lester v. U. S.*, 234 F. 2d 625 (CA 2, 1956, *cert.* granted, 352 U.S. 889, 1956), a claim based upon unseaworthiness by an electrician working on a vessel in drydock. However, the case was settled before consideration of the merits and was therefore dismissed from the docket. It is interesting to observe that in the Government's brief opposing certiorari it was conceded that unseaworthiness could be invoked:

> "Under the decisions of this Court, petitioner, a shore based electrician, is, of course, entitled to a seaworthy ship which means that the ship must be 'reasonably fit' but not that it can 'weather all storms'." (Gov. Br. p.8)

But the Government has reversed its position and now asserts that the seaworthy warranty is inapplicable.

In the interval since *Lester*, the conflicts and uncertainty in the circuits have increased to the point where a review and authoritative ruling is urgently required. It is submitted that the present bewildering state should not be permitted to continue where fortuitous circumstances as to the extent of the work done on a ship or the locale of an accident will determine whether an injured maritime worker will be accorded the protection of the seaworthy warranty.

III. CONFLICT IN APPLICATION OF NEGLIGENCE PRINCIPLES.

The decision in this case has for practical purposes denied the right of a dockyard worker to maintain an action in

negligence. Customarily the shipowner relinquishes control of the vessel when it is turned over to the dockyard for repairs. If a dockyard employee is injured due to failure to supply a safe place to work, he cannot sue his employer, under the provisions of the Longshoremen's and Harbor Workers' Act*; and, under the rule now laid down in the 4th Circuit, he cannot recover against the shipowner *even though its representatives knew that the working conditions were unsafe and took no precautionary measures.* So that, except for the extraordinary case where the shipowner's representatives remain in active control after the vessel is turned over to the yard the shipyard worker is left without a negligence action.

The 4th Circuit's position is that transfer of the vessel to the shipyard immunizes the shipowner from a negligence claim. This is contrary to the decisions in the other circuits which recognize that the fundamental duty to supply a safe place to work persists whether actual control of the vessel is retained by the owner or transferred to a contractor.

In *Halecki*, supra, the 2nd Circuit Court of Appeals stated the correct rule: (per Judge Hand)

> ". . . The deceased was certainly an 'invited person,' or 'business guest,' and the shipowner was liable, not only for the negligence of the master, but, although the work was let out to a subcontractor, also for any lack of 'reasonable care to ascertain the methods and manner in which the concessionaire or independent contractor carries on his activities, not only at the time when the concession is let, or the contractor employed, but also during the entire period in which the concessionaire or contractor carries on his activities'. . . ."

*33 U. S. C. A., Sec. 901 et seq.

And the 3rd Circuit Court of Appeals said in *Feinman v. A. H. Bull S.S. Co.*, 216 F. 2d 393 (1954): (per Judge Biggs)

> "Obviously in a diversity suit brought by a longshore worker against a shipowner, based on negligence, as in the case at bar, the shipowner cannot be relieved of liability when the ship's appliances have become defective or broken simply because he has relinquished control of the vessel to a stevedoring company. . . ."

This is not a case where the important facts were disputed and we are not asking the Court to reexamine fact findings of the lower Courts. We do insist that the Courts below were incorrect in deciding that the shipowner could not be held in negligence simply because the vessel was in the shipyard's control when the accident occurred. It is difficult to imagine a more dangerous situation for a shipworker than a hole in a walkway on which he is working at night without sufficient light. These were the working conditions supplied Petitioner. Yet, the Courts below disregarded *uncontradicted evidence* that the shipowner's representatives knew of the unsafe conditions and failed to take any precautions, to wit:

That at the time of the accident part of the crew was living aboard, including the chief electrician who was present when the accident occured and testified the lighting was "very poor". (R. 1a, p. 52) That the chief government inspector saw the hole in the walkway before the accident. (R. 1a, p. 45) The government inspectors knew that work would be done after dark requiring the use of the walkway. (R. 1a, p. 19) They knew that the customary lighting had been removed. (R. 1a, p. 51) They knew that adequate light was required for the work. Despite this, no warning was given and no precautions were taken, although the customary safeguard was to place a light at a hole. (R. 1a, p. 26, 46, 51-55) That Petitioner did not know the hole was there. (R. 1a, p. 26) That *after* the accident a light

was placed at the hole and the Government inspectors required a report. (R. 1a, p. 13, 14)

It is submitted that these undisputed facts would undoubtedly have been sufficient for a finding of negligence in any circuit but the 4th, which alone among the circuits, regards the vessel's transfer to the shipyard as foreclosing the need for further inquiry. Also the decision below is a step towards the obliteration of the negligence cause of action, contrary to this Court's opinion in *Pope & Talbot, Inc. v. Hawn,* supra, which carefully preserved the harborworker's negligence cause of action:

> "The fact that *Sieracki* upheld the right of workers like Hawn to recover for unseaworthiness does not justify an argument that the Court thereby blotted out their long recognized right to recover in admiralty for negligence."

Importance of third party action.

The decision below and similar decisions which curtail and restrict 3rd party actions usually assume the sufficiency of the remedies provided by the Longshoremen and Harbor Workers Act. This comforting assumption is rudely shaken when we consider the meager remedy afforded by the Act in this case.

The Petitioner has received only $895.00 in compensation payments and has little prospect of any additional payment. The Act does not provide compensation for pain and suffering; for loss of sexual power, for internal injuries and brain injuries; for inability to enjoy life as before the accident. It does not provide compensation for the permanent impairment of his vital bodily functions since they are not among the scheduled injuries; nor partial compensation in a case such as this, where Petitioner has returned to light work at the same wages; it does not take into account the uncertainty of continued light employment and the tragic con-

sequences to Petitioner if he is terminated. And even if he could be put back on compensation, the Act provides only a fraction of the present day cost of living and reduces him from a full provider for his family to a compensation pauper. These factors can receive recognition only in a 3rd party action.

CONCLUSION

The importance of the questions involved and the conflict and uncertainty in the lower courts present a compelling case for review to resolve the conflicts, as well as to reverse the incorrect decision below.

Respectfully submitted,

BERNARD M. GOLDSTEIN,

MARVIN I. SINGER,

Counsel for Petitioner.

APPENDIX A

OPINION OF COURT OF APPEALS

Before PARKER, Chief Judge, and SOPER and SOBELOFF, Circuit Judges.

PER CURIAM:

This is an appeal in a suit in admiralty brought to recover damages sustained by a shipyard worker while working on a government vessel which had been turned over to the shipyard for major repairs and which was then in dry dock in the course of being repaired. The worker was injured when he fell through a hole in a catwalk on the vessel which was caused by the removal of a plate in the course of the repairs being made by the shipyard. He complains of the hole in the catwalk and contends that the lighting was insufficient, although the lighting for the repair job was furnished by the shipyard and not by the vessel. The trial judge exonerated the United States, as owner of the vessel, from the charges of negligence and unseaworthiness, correctly stating as to the latter:

> "In the instant case the libelant shipyard worker was performing duties not within the competence or the traditional or customary activities of the crew. His status therefore was very different from that of a seaman. The ship was in drydock for structural changes which could not have been performed by the crew. In fact the crew had been discharged long before the accident occurred. The ship at the time was not subjected to any perils of navigation. In fact it had necessarily been withdrawn from navigation for a long period. The owner maintained no control over the work by the independent contractor other than the right to inspect to determine whether the structural changes were being performed in accordance with the elaborate specifications. It seems to me a misnomer to speak of the removable and absent footplate as 'unseaworthiness of the ship'. The removal of the absent plate, for the

substitution of others, was a part of the work required to be performed by the contract specifications."

We agree with the trial judge that there was no liability on the part of the United States as owner, for reasons adequately stated in the opinion below, which is adopted as the opinion of this court. See *Raidy v. United States* 153 F. Supp. 777. See also *Berryhill v. Pacific Far East Line* 9 Cir. 238 F. 2d 385, cert. den. 354 U. S. 938.

Affirmed.

DECREE

Filed and Entered February 11, 1958.
UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

APPEALS FROM the United States District Court for the District of Maryland.

THIS CAUSE came on to be heard on the record from the United States District Court for the District of Maryland, and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered, adjudged and decreed by this Court that the decree of the said District Court appealed from, in this cause, be, and the same is hereby, affirmed.

JOHN J. PARKER
Chief Judge, Fourth Circuit.

MORRIS A. SOPER
United States Circuit Judge.

SIMON E. SOBELOFF
United States Circuit Judge.

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v.

UNITED STATES OF AMERICA
AND
BETHLEHEM STEEL COMPANY,
Respondents.

BRIEF OF BETHLEHEM STEEL COMPANY IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

DAVID R. OWEN,
10 Light Street (25th Floor),
Baltimore 2, Maryland,
Attorney for Respondent,
Bethlehem Steel Company.

The Daily Record Co., Baltimore 1, Md.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

No. 931

JAMES S. RAIDY,

Petitioner,

v.

UNITED STATES OF AMERICA

AND

BETHLEHEM STEEL COMPANY,

Respondents.

BRIEF OF BETHLEHEM STEEL COMPANY IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

POSITION OF THIS RESPONDENT

Petitioner sued the United States of America in the District Court for the District of Maryland, in admiralty. The United States impleaded Bethlehem Steel Company under Admiralty Rule 56, which provides with respect to a Respondent-Impleaded: "* * * such suit shall proceed as if such vessel or person had been originally proceeded against * * *. By virtue of this provision Bethlehem Steel Company is properly a Respondent in this Court.

THE OPINIONS BELOW

The opinion of the District Court is reported at 153 F. Supp. 777. The opinion of the Court of Appeals is reported at 252 F. (2d) 117. Both Courts resolved all factual and legal issues in favor of the United States.

QUESTIONS PRESENTED

I. Was the United States negligent? If so,

   A. Was its negligence the proximate cause of the accident?

II. Was the vessel unseaworthy? If so,

   A. Was its unseaworthiness the proximate cause of the accident? If so,

   B. Is Petitioner, a shipyard worker engaged in major structural repairs, entitled to recover for such unseaworthiness?

STATEMENT OF THE CASE

Petitioner's "Statement" is incomplete and inaccurate in important respects. In particular he states repeatedly that he fell through "a hole in the walkway due to a missing plate". He fails to explain that the shipyard was required by its contract with the United States to remove the plate, and that it had been removed to facilitate the installation of the "mixing well" which Petitioner himself was helping to install.

Petitioner also seeks to give the impression that there is no question as to the inadequacy of the lighting at the place of the accident. However, this was, and is, a bitterly contested factual issue.

For these reasons, and for the reason that the fundamental questions presented in this case are factual rather than legal, this Respondent feels it necessary to develop the facts in detail as established by the testimony.

Vessel Was Undergoing Major Structural Repairs and Conversion.

The "Goethals" is a large vessel resembling an ocean-going tanker. At the time of the accident it was in Bethlehem's yard (specifically, in drydock) undergoing a major overhaul and conversion which cost about $600,000 (R. 3a, 41). The vessel was in the yard from September 14, 1954, to December 9, 1954, and from October 25 to November 7 was in the largest drydock (R. 1a, 20). *It was testified without contradiction by the chief government inspector that this type of work is not normally performed by the crew, since it is beyond their physical capability* (R. 3a, 41). In fact only five shipyards on the East Coast can handle such a job (R. 3a, 37).

Both the overhaul and the conversion required drydocking (R. 3a, 42). The former included removal of propellers and shafts and opening of all sea valves, shutting down the power plant, rebuilding the boilers, opening up the turbines, and overhauling all dredge pump machinery and auxiliaries (R. 3a, 31-2).

The conversion involved a complete change of function of the dredge from one which stores its sludge until it can later be dumped in a spoil area, to one which mixes the mud with water and immediately regurgitates it. This required the installation of a number of "mixing wells". These were steel boxes 8′ x 8′ x 25′ fabricated ashore by Bethlehem and set through the main deck into the "hoppers" (comparable to the holds of an ordinary vessel).

This required the cutting of the main strength members of the vessel (including the center line girder for a distance of 180 feet) and the cutting of two 5′ x 5′ holes in the bottom of the ship for the installation of new sea valves (R. 3a, 32).

Petitioner's Work Cannot be Performed by Seamen

Petitioner was a "shipfitter", a specialist in ship construction found only in a shipyard (R. 3a, 21). At the time of his fall one of the wells had been set in place, and he was helping another shipfitter to straighten up the top where it protruded above the deck (R. 1a, 11). *By the uncontradicted testimony this particular job is performed exclusively by shipyard personnel* (R. 3a, 41), *and the members of the crew are not trained to do it* (R. 3a, 44).

Plate had been Removed as Part of the Job

Petitioner fell through a walkway at a point where one of the 3′ x 2′ steel floor-plates had been removed. Bethlehem was actually required by its contract to remove and replace all of these plates, which had become worn after sixteen years' use (R. 3a, 35-6; 42; 43).

Furthermore the plates were intended to be removable so as to give access to the piping under the walkway, and they are frequently so removed (R. 1a, 7; 18). At the time of the accident about six of the plates in the 180 foot length of this walkway had been unbolted and were leaning against the railings at approximately 30 foot intervals (R. 3a, 22; 40; 49). This was necessary because some large pipes under the walkway had to be cut out in order to install the wells (R. 1a, 17; E. 36-7). *It is thus apparent that the removal of the plate in question was an integral*

part of the very job which the United States had employed Bethlehem to perform. In fact during a large part of the contract period there were no plates at all on the catwalk (R. 3a, 39).

Petitioner Should Have Known That the Plate Had Been Removed

Petitioner was definitely not injured as the result of an unknown or unusual danger. Quite the contrary. The hazards which he faced were those which all shipyard workers face every day by the very nature of their work. He had worked on the ship before October 27, 1954 (R. 1a, 24), and knew the condition it was in. When he reported for work at 4 P. M. on that date, he was on the main deck (R. 1a, 59; R. 3a, 50), where the walkways were located. Fifteen minutes before the accident he came back on the deck from a hopper and worked on the catwalk until he fell (R. 1a, 18). He knew that the plates were removable and were frequently removed (R. 1a, 37).

Petitioner's witness Henneman — the man with whom he was handling the chalk line — admitted that he knew at the time that six or seven plates had actually been removed, *including the very plate in question* (R. 3a, 22-3). This should have been obvious to anyone, he said (R. 3a, 23), but it was also "quite possible" that he said something to Petitioner about it (R. 3a, 25). Petitioner's leader, Myers, testified that when the men reported to him on deck at the beginning of the shift, he saw that the plates were turned up (R. 3a, 49-50). The chief government inspector, Burnett, also knew that the plates had been removed (R. 3a, 39-40). In view of this evidence Petitioner's testimony that he did not know the plates were off is incredible.

Lighting Conditions Were Entirely Adequate

Petitioner's description of the light conditions at the place of the accident is greatly exaggerated. The Petition states (p. 3) that the District Court found as a fact that the lighting was "very poor". The opinion does not say so (R. 1a, 64). The only basis for this statement is Judge Chesnut's reference to the testimony of one witness to this effect. However, in the next two sentences the Court shows that he did not believe Petitioner's testimony that the lighting was so inadequate that he had to use a flashlight.

Petitioner's fellow-worker and chief fact witness, Henneman, testified that at the time of the accident it was "dusk" (R. 1a, 9-10) and he had not required any lights (R. 3a, 18). Moreover, he said that he or any other workman could have asked the shipyard electrician for additional lights at any time and gotten them "quickly at the required spots" (R. 3a, 18; 51). *It is uncontradicted that Petitioner himself could have ordered lights if he thought the illumination was insufficient* (R. 3a, 20).

There are numerous glaring inconsistencies in Petitioner's testimony about the lights. He said he asked his leader, Myers for more light (R. 1a, 25; 34) (although he could have ordered it direct from the electricians if he had really needed it). Myers denied having any such conversation (R. 3a, 48) and specifically said that no one had complained about the lights (R. 3a, 51). In fact Petitioner's own witness, Henneman, also admitted that Petitioner did not mention insufficiency of lights (R. 3a, 18).

Petitioner said that when he complained to his leader, he was told to use his flashlight because it was a hurry-up job (R. 1a, 34). Myers denied telling Petitioner any such thing and said he never knew that the man had a flash-

light (R. 3a, 48; 51). This is corroborated by the testimony of Petitioner's witness Simms who was working in the hopper where Petitioner fell. He said that the *flashlight fell out of Petitioner's pocket as he lay there* (R. 1a, 22). From this it is perfectly obvious that he could not have been using it before he fell, which in turn strongly negatives his claim of insufficient light. The District Court naturally noted this (R. 1a, 64).

Petitioner's description of the extension light in use at the scene of the accident is particularly at odds with the facts. At first he testified that there were no lights on the ship at all. The nearest lights, he said, were on the drydock wall 30-40 feet away (R. 1a, 25). Later he reversed himself completely and described a 300-500 watt light only 15 feet away on top of the mixing well (R. 1a, 60).

A 300-500 watt bulb gives off a great deal of light at 15 feet. Henneman, the co-worker, said there was sufficient light to use the chalk line, which is a piece of string one-sixteenth of an inch in diameter (R. 3a, 21-2). Myers testified that he was only 5-10 feet from Petitioner when he fell (R. 3a, 48), and that he was having no difficulty in reading graduations of *one-sixteenth* inch on a carpenter's rule he was using (R. 3a, 48-9). Under these conditions it is inconceivable that Petitioner had insufficient light to see a 3' x 2' hole in the catwalk.

The Lighting Condition Was Not the Proximate Cause of the Accident.

Any causal connection between the light conditions and the accident was negatived by the fact that when he fell into the hold he was walking *backward* and was looking upward and not down at the walkway where he was stepping (R. 1a, 26-7, 36). No such causal connection was found by the trial court.

In this connection it is significant that a large staging five feet high, and taking up almost the entire width of the walkway, had been placed by the shipyard adjacent to the hole on the side nearest to Petitioner (R. 1a, 12-3, 57; R. 3a, 50). He actually had to "climb" around it (R. 1a, 35-6; R. 3a, 22-3). Whatever its purpose, the staging could scarcely have been improved upon as a barricade to prevent people from falling into the hole. However, Petitioner, climbing around it backwards and looking up at his string rather than down at the catwalk behind the staging, managed to step into the hole. His fellow-worker, Henneman, on the other hand, had had no difficulty in seeing the missing plate on the other side of the staging (R. 3a, 22-3).

Petitioner made much of some testimony that after the accident a light was placed directly over the hole. This testimony was objected to and clearly should have been excluded (R. 3a, 19). Later, objections were sustained to the same questions, and the District Court conceded that they violated "the ordinary rules of evidence" (R. 1a, 56; R. 3a, 26-7).

Bethlehem paid the Petitioner compensation for temporary total disability under the Longshoremen's Act until his return to work (Tr. 309). It also paid his medical expenses. He is, of course, still eligible for permanent disability benefits (if he suffered a permanent injury).

ARGUMENT

I.

This Court Should Not Review the Findings of Fact of the District Court Which Were Unanimously Concurred in by the Court of Appeals.

The Petition states (p. 13) that: "This is not a case where the important facts were disputed * * *." On the

contrary, many, if not most, of the important facts were disputed. For example, there was a hopeless conflict in the testimony regarding the adequacy of the lighting conditions. Petitioner's references (pp. 2, 13) to "uncontradicted" evidence of "unsafe conditions" are simply fanciful.

Petitioner states (p. 13) that he is "not asking the Court to re-examine fact findings of the lower Courts". Despite his protestations, however, that is exactly what he wants this Court to do. Petitioner would like this Court to hold that a shipyard worker can recover for unseaworthiness, even though he is not performing a seaman's work. However, before reaching that question of law the Court would have to find as a matter of fact (1) that the owner was negligent, or (2) that the vessel was unseaworthy, and (3) that the negligence and/or unseaworthiness was the proximate cause of the accident.

The District Court (R. 1a, 62) prefaced his recital of the facts with the following statement: "From the evidence in the case I find the following relevant and important facts". After reciting the facts the District Court stated his conclusion as follows (R. 1a, 64):

> "On these facts and in the circumstances stated I find and conclude that (a) there was no negligence on the part of the shipowner causing or contributing to the libelant's injuries, and (b) the ship at the time was not 'unseaworthy' ".

The issues were thus basically factual.

Having found that the United States was not negligent and that the ship was not unseaworthy, the Court might have dismissed the libel without more discussion, but he chose to proceed with a further discussion as to whether the Libelant was one of that class of workers who is entitled to recover for unseaworthiness. He concluded that the Libelant had no such right. However, this discussion

and conclusion was not necessary to the Court's decision, since his findings on negligence and unseaworthiness completely disposed of the libel.

The Court of Appeals unanimously concurred in Judge Chesnut's findings and conclusions. This Court has frequently stated its unwillingness to reconsider factual issued concurred in by the District Court and the Court of Appeals. For example, the following statement was made in *Graver Tank & Mfg. Co. v. Linde Air Products Co.*, 336 U. S. 271, 275 (1949):

> "A court of law, such as this Court is, rather than a court for correction of errors in fact finding, cannot undertake to review concurrent findings of fact by two courts below in the absence of a very obvious and exceptional showing of error."

We submit that this rule should be applied here.

II.

This Case Presents No Conflict With the Decisions of This Court.

Petitioner attempts to develop some inconsistency between this case and *Seas Shipping Co. v. Sieracki*, 328 U. S. 85 (1946), *Pope & Talbot, Inc. v. Hawn*, 346 U. S. 406 (1953) and *Alaska S. S. Co. v. Petterson*, 347 U. S. 396 (1954). Exactly the same contention was made in the petition for writ of certiorari in the very similar case of *Berryhill v. Pacific Far East Line* 238 F. (2d) 385 (C. A. 9, 1956), but that petition was denied. 354 U. S. 938 (1957). If there was no conflict between *Berryhill* and the *Sieracki, Hawn* and *Petterson* decisions, then the instant case represents no conflict either.

As previously pointed out, the courts below had to decide (1) whether the United States was negligent, and (2)

whether the ship was unseaworthy. These issues having been resolved against Raidy, there was no necessity for considering whether he was a type of worker who could recover for unseaworthiness. It is therefore most surprising to find that the Petition consists chiefly of an argument that this Court should review what is, strictly speaking, only a dictum of the court below dealing with the status of the Libellant.

Actually the comments of the courts below on Raidy's status as a Libellant are in complete accord with the *ratio decidendi* of the three cases in this Court referred to above. From numerous references in the opinion of Mr. Justice Rutledge it is entirely clear that the Sieracki decision was based upon the proposition that, for some purposes, a longshoreman is "a seaman because he is doing a seaman's work" (p. 99). At page 96 it is stated that: "Historically the work of loading and unloading is the work of the ship's service, performed until recent times by members of the crew". Similar statements from previous decisions of the Court are quoted at pages 98 and 99. In a vigorous dissent Chief Justice Stone pointed out the very real differences between a longshoreman's problems and those of a seaman.

In the *Hawn* case Mr. Justice Jackson, writing the dissenting opinion for himself and two other Justices, developed in detail the historical and legal differences between the employment of a seaman and that of a longshoreman. Although the majority adhered to the *Sieracki* decision, the opinion of Mr. Justice Black makes it clear that the rationale of the decision was Hawn's connection with the loading of the ship. At page 412-3 he said:

> "Sieracki's legal protection was not based on the name 'stevedore' but on the type of work he did and its relationship to the ship and to the historic doctrine of

> seaworthiness. The ship on which Hawn was hurt was being loaded when the grain loading equipment developed a slight defect. Hawn was put to work on it so that the loading could go on at once. There he was hurt."

Adhering carefully to the test established in *Sieracki* and reaffirmed in *Hawn*, Judge Chesnut made the following important finding from the evidence (R. 1a, 68):

> "In the instant case the libelant shipyard worker was performing duties not within the competence or the traditional or customary activities of the crew. His status therefore was very different from that of a seaman. The ship was in drydock for structural changes which could not have been performed by the crew."

This statement was specifically approved and adopted by the Court of Appeals (App. A, 16). This conclusion is in strict accordance with the rationale of the *Sieracki* and *Hawn* decisions.

The *Petterson* case was not concerned with the status of the Libellant (a longshoreman) as a person entitled to recover for unseaworthiness. This Court apparently found no conflict between it and *Berryhill*. Indeed, any inconsistency between them would have been most surprising, since both cases came up from the Court of Appeals for the Ninth Circuit. The instant case bears exactly the same relation to *Petterson* as did *Berryhill*. Furthermore, it must be born in mind that, whatever the effect of *Petterson* upon the "surrender of control" doctrine, this doctrine and the *Petterson* decision involve unseaworthiness only. The extent of surrender of control of the vessel still plays an important part in negligence cases. This will be further discussed below.

III.

This Case Presents No Conflict Between the Circuits as to Petitioner's Right to Recover for Unseaworthiness.

The Courts of Appeals of several circuits have decided cases similar to the case at bar, and each decision has been adverse to the shipyard worker engaged in major structural repairs or conversion work. The Ninth Circuit's decision in *Berryhill* has already been referred to. In *Berge v. National Bulk Carriers Corporation*, 251 F. (2d) 717 (C. A. 2, 1958), the Second Circuit reached the same result even though the vessel was not in drydock, as it was in the instant case. Judge Learned Hand, speaking for the Court, stated at page 718 that the situation was not within the doctrine of *Sieracki* and the decisions which followed it, for the following reason:

> "* * * the answer depends upon whether the work on which the plaintiff was engaged was of a kind that the crew of a vessel was accustomed to perform. Obviously there must be some limit, else the whole fabrication of a new ship would be included. We can only say that the reconstruction of a ship was not traditionally the task of the crew."

On the same day that it decided the *Berge* case, the Second Circuit decided *Halecki v. United New York and New Jersey Sandy Hook Pilots Association*, 251 F. (2d) 708 (C. A. 2, 1958), with the majority opinion also written by Judge Hand. Here the Libelant was permitted to recover because he was simply engaged in cleaning electrical equipment, which was work commonly performed by seamen. As Judge Hand pointed out at page 712, "* * * the work did not involve any structural changes in the ship, but was of a kind that was part of the crew's work, not only at sea, but when she was laid up for general overhaul." In a vigorous dissent Judge Lumbard expressed his opinion

that the case did not come within the *Sieracki-Hawn* principle because the Libelant "* * * was not doing what any crew member had ever done on this ship or anywhere else in the world, so far as we are informed."

The issue framed by the majority at page 711 (and adopted by the dissenting judge) is precisely the same as that recognized in the instant case and in *Berryhill*, *Sieracki* and *Hawn*.

> "* * * We think that the test is whether the work is of a kind that traditionally the crew has been accustomed to do, and as to that it makes no difference that the means employed have changed with time, or whether defective apparatus was brought aboard and was not part of the ship's own gear."

In addition to the above mentioned appellate decisions District Courts in two other Circuits have reached the same result in cases virtually identical with the case at bar. *West v. United States*, 143 F. Supp. 473, 246 F. (2d) 443 (E. D. Pa. 1956); *Owens v. United States*, 1958 A. M. C. 216 (S. D. Fla. 1957).

Petitioner cites *Read v. United States*, 201 F. (2d) 758 (C. A. 3, 1953) as being in conflict with the above decisions. With this we do not agree. Actually that court did not engage in any discussion of the point now under consideration but contented itself with citing its own decision in the *Hawn* case. What it did hold in *Read* was (p. 762) that the ship's appliances were defective *at the time it was turned over to the repair contractor*, so that the ship was guilty of a "failure to supply and keep in order the proper appliances appurtenant to the ship". That is not the situation here and the two cases are therefore quite distinguishable.

That the Third Circuit is in accord, and not in conflict, with the Second, Fourth and Ninth as to the legal test to be applied in these cases is evident from its later decision in *Crawford v. Pope & Talbot, Inc.*, 206 F. (2d) 784 (C. A. 3, 1953). There the libellant was a tank cleaner employed by an independent contractor. The court found (p. 790) that his "work in the deep tanks was clearly 'ship's work' within the meaning of the *Sieracki* case". Indeed it pointed out that at the very time he was injured members of the crew were similarly engaged in cleaning the adjoining tanks. It should also be pointed out that the District Court for the Eastern District of Pennsylvania, in the *West* case has interpreted *Read* as we have here interpreted it.

Petitioner also cited three dicta of the First and Sixth Circuits as allegedly representing a conflict with the decisions of other circuits. *Christiansen v. United States*, 192 F. (2d) 199 (C. A. 1, 1951); *Imperial Oil Ltd. v. Drlik*, 234 F. (2d) 4 (C. A. 6, 1956); *Pioneer Steamship Co. v. Hill*, 227 F. (2d) 262 (C. A. 6, 1955). This comparison is completely far-fetched. The *Christiansen* case was a claim by a tank cleaner for negligence. The nature of the work was clearly that of a seaman as in *Crawford*. The *Drlik* case involved a claim by a shipyard worker who was actually handling mooring lines at the time he was injured, an activity which is characteristic of seamen. In the *Hill* case the court stated only that the libellant was "probably" within the class of persons entitled to the seaworthiness doctrine. All three cases involved negligence exclusively.

IV.

This Case Presents No Conflict Between the Circuits as to the Issue of Negligence.

As Judge Chesnut recognized (R. 1a, 62), this case was tried primarily on the theory of unseaworthiness. Never-

theless, he made a complete determination of the isues by finding as a fact and concluding as a matter of law that the ship-owner was not negligent. This was chiefly a factual determination which this court should not undertake to review. However, Petitioner still attempts to create the illusion of a conflict between the Circuits on the question of negligence, and we will therefore refer to it briefly.

Petitioner claims that the United States is liable to him for failing to provide him with a safe place to work, for which it has a nondelegable duty. However, this is merely a duty to use reasonable care to provide a reasonably safe place to work and is therefore a part of the law of negligence. *Brabazon v. Belships Co.*, 202 F. (2d) 904 (C. A. 3, 1953); *West v. United States*, 143 F. Supp. 473 (E. D. Pa. 1956); *McMahon v. Panamolga*, 127 F. Supp. 659 (D. Md. 1955). It is not an absolute duty imposed upon the ship-owner, as is the duty to provide a seaworthy ship.

In this field it may be of crucial importance whether the owner has relinquished complete control of the vessel to the shipyard. The *Petterson* case has no bearing upon this problem, since it involved unseaworthiness and not negligence. We know of no case holding an owner liable for failure to provide a safe place to work to an employee of an independent contractor where (1) complete control of the ship was relinquished and (2) at the time of relinquishment the ship and its appliances were safe and seaworthy in all respects. Petitioner has never cited any such case.

As good an illustration as any other of the validity of this proposition is a case strongly relied upon by Petitioner on another point. *Pioneer Steamship Company v. Hill*, 227 F. 2d 262 (C. A. 6, 1955). There the Sixth Circuit held that the determination of negligence *vel non* depended entirely upon the question of whether or not the

owner had surrendered general control and supervision of the ship to the repair yard. The District Court found that such control had not been surrendered, and the Court of Appeals accepted this "crucial finding" on the ground that it was not clearly erroneous, even though the Appellate Court might have drawn a different inference from the evidence. The District Court stated the basic legal proposition as follows (134 F. Supp. at 368):

> "It is indisputable that the shipowner is not liable in negligence unless it is established that it had control of the vessel at the time of the charged negligence."

In the longshoremen cases (and in some shipyard cases) the owner surrenders to the independent contractor control of only a part of the ship. In the instant case the vessel had been completely turned over to the shipyard by the United States, at which time it had no defects. The District Court and the Court of Appeals duly noted these facts and held, both as a matter of fact and as a matter of law, that the United States was not liable in negligence to the Libelant.

There is no conflict among the Circuits on this point. As a matter of fact, the opinion of the Ninth Circuit in *Petterson* carefully pointed out that in negligence cases the owner's relinquishment of "complete control" may be important. 205 F. 2d at 479. Petitioner cites no cases representing a conflict but simply quotes, out of context, statements from *Halecki* and *Feinman v. A. H. Bull S. S. Co.*, 216 F. 2d 393 (C. A. 3, 1954). These cases are not inconsistent with the decision below, since in each of them the owner retained general control and supervision of the ship, relinquishing only a limited control to the contractor. *Halecki* held on this issue simply that the negligence of

the owner was for the jury. In *Feinman* the Third Circuit approved an instruction to the jury which was in complete accord with the proposition stated above.

CONCLUSION

In *Sieracki* and *Hawn* this Court established the following test: Was the harbor-worker doing a seaman's work when he was injured? This mandate has been carefully executed by the Courts below and those in other Circuits. Petitioner's complaint is not that they have failed to apply the correct legal principle, but rather that the application of this principle to differing fact situations has produced differing results (Pet., p. 7). This is not a sufficient ground for the granting of the Petition.

Respectfully submitted,

DAVID R. OWEN,
10 Light Street (25th Floor),
Baltimore 2, Maryland,
Attorney for Respondent,
Bethlehem Steel Company.

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BERNARD M. GOLDSTEIN,
1716 Court Square Building
Baltimore 2, Maryland

MARVIN I. SINGER,
Counsel for Petitioner.

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PETITIONER'S REPLY BRIEF

Inasmuch as this case is based most importantly on the failure to supply proper lighting at night, which was the basis for recovery in *Read* v. *United States*, we consider it necessary to call the Court's attention to the misstatement in the Government's Brief In Opposition, p. 10,

> ". . . In *Read* v. *United States*, 201 F. 2d 758, the Court of Appeals for the Third Circuit granted the protection of seaworthiness to a workman injured by reason of the shipowner's failure to maintain adequate lighting aboard, where, unlike here . . . the shipowner was responsible for the lighting. . . ."

This statement is incorrect. In *Read* the shipyard, not the shipowner, was required by the contract to

> "put up and keep at night suitable and sufficient lights where necessary during the prosecution of the work." (See Court's opinion, 201 F. 2d at page 759 and footnote setting forth pertinent parts of the contract).

Respectfully submitted,

BERNARD M. GOLDSTEIN,

MARVIN I. SINGER,

Counsel for Petitioner.

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v.

UNITED STATES OF AMERICA AND BETHLEHEM STEEL COMPANY

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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BRIEF FOR THE UNITED STATES IN OPPOSITION

J. LEE RANKIN,
Solicitor General,

GEORGE COCHRAN DOUB,
Assistant Attorney General,

SAMUEL D. SLADE,
HERBERT E. MORRIS,
Attorneys,
Department of Justice,
Washington 25, D. C.

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OPINIONS BELOW

The opinion of the United States District Court for the District of Maryland (R. 1a, pp. 61-68) is reported at 153 F. Supp. 777. The *per curiam* opinion of the United States Court of Appeals for the Fourth Circuit (Pet. App. 16-17) is reported at 252 F. 2d 117.

JURISDICTION

The judgment of the Court of Appeals was entered on February 11, 1958. The petition for a writ of

certiorari was filed on April 18, 1958. The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1).

QUESTIONS PRESENTED

1. Whether both courts below correctly declined to permit recovery against a shipowner for alleged breach of a warranty of seaworthiness in a suit brought by a shipfitter engaged, at the time of his injury, in a part of the major reconstruction of the vessel in drydock by his shipyard employer, where his fall resulted from the removal of a walkway plate by the repairing shipyard, for the substitution of another as required by the contract specifications.

2. Whether both courts correctly held that the shipowner was not negligent in the circumstances of this case.

STATEMENT

This action, filed pursuant to the Public Vessels Act, 46 U.S.C. 781, *et seq.*, was instituted to recover damages from the United States for injuries sustained by petitioner in a fall on board the dredge *Goethals*, owned by the United States and operated by the Army Corps of Engineers for dredging harbors and other navigable waters. The undisputed basic facts, as found by the District Court, are as follows:

The accident took place in the drydock of the Bethlehem Steel Company, Shipbuilding Division, where the dredge *Goethals*, a seagoing hopper dredge of about 9,000 tons displacement, was undergoing com-

plete reconstruction and conversion of its dredging mechanism, as well as extensive overhauling and repairs, at an approximated cost in excess of $600,000 (R. 1a, p. 62). The *Goethals* was delivered to Bethlehem on September 14, 1954, and remained in its possession until completion of the work on December 9, 1954 (R. 1a, p. 63). During this period, the crew of the dredge was dismissed, the power and engines were shut down, and Bethlehem, as required by contract, furnished all power, lighting and staging needed on the job (R. 1a, p. 63). The Government reserved a bare right to inspect the work and materials to insure compliance with contract specifications, but Bethlehem alone had control over the manner of performance, and the scheduling and progress of all phases of the reconstruction (R. 1a, pp. 62-63).

There was no contention made that, when the dredge was turned over to Bethlehem for major reconstruction, it was in any way unseaworthy or, most important here, that any of the steel plates, making up the walkway from which petitioner fell, were missing. In fact, one of the repair jobs required by the contract was the removal of the steel plates, each about three feet square, making up the dredge's walkways (R. 1a, pp. 63, 68). Removal of these plates was necessary to permit access to pipes and other machinery under the walkways. Moreover, the contract specifications required that Bethlehem ultimately replace the steel plates with new aluminum floor plates (R. 1a, p. 68; 3a, pp. 35-36).

On the date of the accident, October 27, 1954, the *Goethals* had been in a drydock of the Bethlehem

Steel Company for three days (R. 1a, p. 63). It had been placed there to facilitate the installation of new hoppers or mixing wells by skilled shipfitters and other repairmen of the Bethlehem Company (R. 1a, p. 63). Petitioner was employed by Bethlehem as a shipfitter and was engaged in the installation of the mixing wells (R. 1a, p. 63). In order to obtain proper alignment of one of these wells, a Bethlehem foreman instructed petitioner and another shipfitter to proceed along a steel plate walkway and run a chalk line measurement (R. 1a, p. 63). Uncontradicted evidence established that installation and alignment of these mixing wells were tasks within the special competence of shipyard shipfitters and beyond the knowledge, training or experience of seamen (R. 1a, p. 64; 3a, p. 41).

While engaged in running the chalk line measurement, petitioner backed along the walkway, felt his way around a work bench or staging platform placed on the walkway by Bethlehem in the conversion work, and, continuing to back up, fell through a hole in the walkway caused by the removal of a steel plate by Bethlehem employees as part of the repair work (R. 1a, p. 63). This plate, as well as six or seven others on the walkway, had been removed by Bethlehem to allow access to the pipes and other structures underneath (R. 1a, pp. 63-64).

In his libel filed in the District Court (R. 1a, pp. 1-4), petitioner sought recovery on the alternative theories that his injuries were caused either by reason of the unseaworthiness of the *Goethals* or by the negligence of agents of the United States. The criti-

cal allegations of the libel were denied by the United States (R. 3a, pp. 2-5).[1]

A full trial was held. Based on its careful scrutiny of the evidence, the District Court held that the ship was not unseaworthy in the circumstances of this case (R. 1a, pp. 64, 68). The court emphasized that the major reconstruction of the dredge by Bethlehem in drydock and the skilled shipfitting work done by petitioner were neither "the type of services historically and traditionally rendered to the ship by members of the crew" nor could they currently be performed without the "facilities and skilled personnel of a modern well equipped shipyard" (R. 1a, p. 64). Of equal significance in the District Court's view was the fact that the *Goethals* was turned over to Bethlehem with its metal walkways fully intact and that the removal of the plate causing petitioner's fall was accomplished by the shipyard in its performance of contract specifications (R. 1a, p. 68). The District Court also held that there was no negligence on the part of government employees causing or contributing to petitioner's injury (R. 1a, pp. 64, 68).

On appeal, the United States Court of Appeals for the Fourth Circuit affirmed, *per curiam*, adopting the District Court's opinion as its own (Pet. App. 16-17).

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[1] Asserting a contractual and common law right to indemnity, the United States impleaded petitioner's employee, the Bethlehem Steel Company, as a third-party respondent (R. 3a, pp. 5-9). The District Court ruled that, as the shipowner was not liable, "there [was] no occasion to consider possible liability of Bethlehem as an impleaded respondent" (R. 1a, p. 68). The Court of Appeals' disposition of the original action rendered it unnecessary to consider the Government's appeal from this aspect of the decision.

ARGUMENT

The District Court and the Court of Appeals correctly held that, under the controlling principle for recovery on the basis of unseaworthiness as established by this Court in *Seas Shipping Co., Inc.* v. *Sieracki*, 328 U.S. 85, and applied by this Court in subsequent decisions,[2] a shipowner is not liable in the circumstances of this case. The decisions below are in complete conformity with the rule of those cases, *i.e.*, that while the warranty of seaworthiness is not restricted exclusively to seamen, those who are entitled to its protection must be doing seamen's work and incurring seamen's hazards. Contrary to petitioner's position, there is no conflict with the decisions of this Court, or with decisions of other Courts of Appeals which have consistently applied this principle to varying factual situations. Indeed, the rulings here were expressly based on, and are in accord with, the recent decision of the Court of Appeals for the Ninth Circuit in *Berryhill* v. *Pacific Far East Line*, 238 F. 2d 385, involving substantially identical facts, in which this Court recently denied a petition for a writ of certiorari, 354 U.S. 938. Moreover, petitioner's contention of conflict with other decisions in regard to that part of the holding exonerating the United States from negligence is equally unfounded. Accordingly, there is no occasion for further review by this Court.

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[2] *Pope & Talbot, Inc.* v. *Hawn*, 346 U.S. 406; *Alaska Steamship Co.* v. *Petterson*, 347 U.S. 396, affirming, *per curiam*, *Petterson* v. *Alaska Steamship Co.*, 205 F. 2d 478 (C.A. 9).

1. It has been established by this Court that a shipowner's obligation to provide a seaworthy ship extends to individuals other than seamen if, at the time of the injury, they were doing seamen's work and were exposed to seamen's hazards.[3] *Seas Shipping Co.* v. *Sieracki*, 328 U.S. 85, 95, 99. In two subsequent decisions, the Court has reaffirmed this conclusion. In *Pope & Talbot, Inc.* v. *Hawn*, 346 U.S. 406, recovery for unseaworthiness was expressly predicated on the type of work done by the claimant and its relationship to the historical concept of the "ship's service." Since the work involved only repair of a "slight defect" in the loading equipment and was inextricably related to the loading process itself, work said by this Court to be traditionally and historically within the scope of the crew's duties, the Court affirmed the holding of the Court of Appeals permitting recovery on the ground of unseaworthiness. And in *Alaska Steamship Co.* v. *Petterson*, 347 U.S. 396, the Court affirmed, *per curiam* and without opinion, a decision of the Ninth Circuit[4] granting the protection of the warranty of seaworthiness to a workman injured by a breaking block also while engaged in the ship's service of loading and unloading.[5]

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[3] In *Sieracki*, the claimant was a stevedore injured while aboard and loading the shipowner's vessel.

[4] *Petterson* v. *Alaska Steamship Co.*, 205 F. 2d 478.

[5] While the block apparently belonged to the stevedoring company, that company had been offered the option by the shipowner of using its own or the ship's block, thus providing the basis for considering the equipment that of the ship. See *Berryhill* v. *Pacific Far East Line*, 238 F. 2d 385, 387 (C.A. 9), certiorari denied, 354 U.S. 938.

Thus, each of the relevant pronouncements by this Court has been limited to the factual context of work done in the loading and unloading of the shipowner's vessel, work considered by the Court an historical function of the seaman. Not one of these decisions provides a basis for petitioner's suggestion that the guiding criterion of "ship's service" encompasses any and all work accomplished by workmen on a vessel, whether or not the work is part of major reconstruction in drydock, or whether or not a step in the process of reconstruction is the sole causative factor in the accident. When it is recognized that petitioner's work in the reconstruction and conversion of the *Goethals* in drydock was not substantially different from his work in constructing new ships, it becomes immediately apparent that acceptance of petitioner's view of the *Sieracki* standard of seamen's work obliterates that standard completely.[6]

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[6] The majority opinion in *Sieracki* implicitly excepted from application of the seaworthiness protection to non-seamen those situations where the perils aboard ship were obvious, or the action of the contractor-employer of the claimant created the cause of the accident. *Seas Shipping Co.* v. *Sieracki*, 328 U.S. 85, 95. This latter consideration is squarely in point here. The *Goethals* was brought into Bethlehem with walkway plates fully intact, and Bethlehem, having complete control over when and how the steel plates were to be removed and replaced, along with supervision over all other phases of reconstruction, was solely responsible for creating the situation which resulted in petitioner's fall. As the District Court remarked in its opinion here, "[i]t seems * * * a misnomer to speak of the removable and absent footplate as 'unseaworthiness of the ship.'"

As we have said, both courts below relied on the decision in *Berryhill* v. *Pacific Far East Line*, 238 F. 2d 385 (C.A. 9), certiorari denied, 354 U.S. 938, where the critical facts were similar to those here. The claimant in that case was a workman of a shipyard corporation engaged in major repairs of the shipowner's vessel in drydock. While repairing the propulsion machinery of the vessel, a grinding wheel furnished claimant by the shipyard corporation disintegrated causing his injury. In rejecting the argument that the *Sieracki* rule was applicable, the Court of Appeals observed (238 F. 2d at 387):

> The facts in this instant case would extend the doctrine of absolute liability for unseaworthiness * * * beyond any previous holdings. Here the repairs had nothing to do with loading or unloading the ship. The propulsion machinery of the vessel itself was being repaired. Not all repairs are "ship's work", to be performed, historically or currently by the crew. * * * In the instant case, the repairs were nothing of an improvised, hurried nature, done to save the "ship work" time, but were of sufficient importance to cause the ship to be drydocked.
>
> The Courts have recognized the distinction between the protection required by a seaman, and one who works on a ship cradled on dry land. The very reason for the rule of absolute liability ends, when the vessel is not on water. * * *

These considerations, we submit, are equally pertinent to the facts here.

Petitioner's assertion of a conflict between the decision below and decisions in other courts of appeals

(Pet. 5-7) is without merit. The *Sieracki* rule must be fitted to innumerable factual situations, and differences in results, reached by applying the same controlling principle of law, cannot properly be characterized as "conflicts". See *Layne & Bowler Corp.* v. *Western Well Works, Inc.*, 261 U.S. 387, 393. In any event, petitioner cites no decision which has extended the protection of seaworthiness to one engaged in major reconstruction in drydock who is injured by a condition created solely by his employer. In *Read* v. *United States*, 201 F. 2d 758, the Court of Appeals for the Third Circuit granted the protection of seaworthiness to a workman injured by reason of the shipowner's failure to maintain adequate lighting aboard, where, unlike here (see p. 3, *supra*), the shipowner was responsible for the lighting. In *Christiansen* v. *United States*, 192 F. 2d 199, the Court of Appeals for the First Circuit denied the protection to an employee of a shipcleaning firm since that firm, in not providing him with a ladder or platform on which he could work, was responsible for his fall. Rather than being in conflict, this decision is in accord with the holding here. Finally, in both cases from the Court of Appeals for the Sixth Circuit relied on by petitioner,[7] the decisions were expressly predicated on negligence and not on unseaworthiness.

Nor does the granting of a petition for a writ of certiorari in *Lester* v. *United States*, 234 F. 2d 625, (C.A. 2), certiorari granted 352 U.S. 889, advance

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[7] *Pioneer Steamship Company* v. *Hill*, 227 F. 2d 262; *Imperial Oil, Limited* v. *Drlik*, 234 F. 2d 4.

petitioner's cause.[8] In that case, the district court ruled[9] that a duty to install a handrail on a pilothouse roof was recognized by the shipowner in the original contract of repair and that failure to discharge this duty was the causative factor in the repairman's injury. The Court of Appeals reversed, holding that no such inference could be drawn from the contract provision and that, in the circumstances, the shipowner had provided the repairman with a safe place to work. The primary question presented for this Court's review on certiorari was whether the Court of Appeals properly reversed the District Court's judgment in view of the "clearly erroneous" rule as applied to admiralty proceedings. See *McAllister* v. *United States*, 348 U.S. 19.

It is thus apparent that there is no conflict in principle here with decisions of this Court or of other Courts of Appeals on the *Sieracki* doctrine. The courts below properly found that, upon careful examination of the factual situation presented, petitioner's work and the circumstances of his injury were far removed from the standard of liability established in *Sieracki* and subsequent decisions.

2. Petitioner also contends that the ruling exonerating the United States from liability for negligence presents a conflict with decisions of other courts of appeals. However, this argument is without merit in that it is grounded on the erroneous assumption that the District Court determined this issue solely

[8] The case was dismissed from this Court's docket upon conclusion of a settlement between the parties.

[9] 127 F.Supp. 113 (E.D. N.Y.).

on the fact that the shipowner surrendered control of the vessel to Bethlehem. In fact, the District Court after detailed treatment of the facts surrounding the contract of reconstruction, the limited right of inspection afforded the United States under that contract,[10] the accident itself, and the condition of the ship, correctly found that there was no negligence on the part of the United States "with respect to the condition of the ship or causing the [petitioner's] injuries" (R. 1a, p. 68). These findings with regard to negligence were properly upheld by the Court of Appeals which is bound by the decision of the District Court unless that decision is clearly erroneous. *McAllister* v. *United States*, *supra*. There is thus no basis for petitioner's suggestion that the holding with regard to negligence "is contrary to the decisions in the other circuits" (Pet. 12).

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[10] The United States inspectors aboard were limited by contract to inspect completed work items and materials used to insure compliance with contract specifications (R. 1a, pp. 62-63). They had no right of supervision over the manner in which any work was performed or over any employee of Bethlehem.

CONCLUSION

For the foregoing reasons, we respectfully submit that the petition for a writ of certiorari should be denied.

J. LEE RANKIN,
Solicitor General.

GEORGE COCHRAN DOUB,
Assistant Attorney General.

SAMUEL D. SLADE,
HERBERT E. MORRIS,
Attorneys.

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